United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original - Affidavit of Mailing

74-2063

To be argued by
MYLES C. CUNNINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2063

UNITED STATES OF AMERICA,

Appellee,

—against—

RICHARD PATTERSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
MYLES C. CUNNINGHAM,
Assistant United States Attorneys,
of Counsel.

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Preliminary Statement

Richard Patterson appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered May 10, 1974, which judgment convicted appellant, after a jury trial, of the attempt to distribute approximately one-eighth of a kilogram of heroin hydrochloride (21, U.S.C. 846). Appellant was sentenced on July 26, 1974 to six years imprisonment; to serve six months with five and a half years suspended and a special parole term of six years with a stay of execution until August 26, 1974. On that date appellant surrendered to federal authorities and is presently serving his six month jail term.

Appellant asserts that the trial court erred: (1) in refusing to permit pre-trial inspection of the grand jury

minutes and in refusing to dismiss the indictment; (2) in admitting into evidence an unsigned statement of the defendant; (3) in admitting into evidence the tape recording of appellant's phone conversation with an agent of the Drug Enforcement Administration; and (4) in refusing to set aside the verdict as one which was against the weight of the evidence.

Statement of Facts

(1)

As a result of confidential information, not derived from electronic surveillance of any nature, it was learned by agents of the Drug Enforcement Administration that appellant had been negotiating with a person from Pittsburgh for the sale of one eighth of a kilogram of heroin for $5000 and that appellant was anticipating a phone call to arrange delivery. Armed with this knowledge, Drug Enforcement Administration Agents proceeded to LaGuardia Airport on January 30, 1973 with the anticipation of intercepting the sale. Special Agent William Simpson was instructed to enter a phone booth at the airport at approximately 6:45 P.M., call a number where it was believed appellant could be contacted, and, identifying himself as "Mike from Pittsburgh", was to speak to appellant, who was known as "Richard". He would then seek to negotiate the sale (T. 90-91).*

The entire conversation between Agent Simpson and appellant was recorded. While Agent Simpson made the telephone call, Special Agents Richard Slattery and Philip Bellini waited nearby (T. 99). Agent Simpson told appellant that he was "Mike from Pittsburgh," was presently at LaGuardia Airport with the money, that he wanted appellant to come to the airport with the "package" where they could discuss the deal and that he wanted to leave

* Page numbers in parenthesis refer to the trial transcript.

New York as soon as possible. Agent Simpson, however, refused an offer from appellant to be picked up at the airport and presumably taken elsewhere for the transaction. It was then agreed between Agent Simpson and appellant that they would meet in the second level bar at the Alleghany Airlines terminal at approximately 7:05 P.M. Appellant was advised that Agent Simpson would be wearing a black leather jacket with red pants and, in response to an inquiry as to how he would be recognized, appellant said: "I'll be wearing a black cap and a red leather coat, burgundy leather coat" (T. 95-99).

After the completion of this phone conversation, five agents of the Drug Enforcement Administration located themselves throughout the Alleghany terminal for the purpose of surveilling the anticipated meeting between Agent Simpson and appellant (T. 15-16, 99). At approximately 7:10 P.M. on January 30, 1973, Slattery, the supervisory agent, observed appellant driving a 1965 Buick convertible on the second floor level of the Alleghany Airlines Terminal (T. 11). A young lady, later identified as one Juanita Bryant (a/k/a "Pookie"), was riding in the car with appellant (T. 17). Appellant parked the car a short distance from the terminal entrance, exited the car, leaving Miss Bryant inside, and entered the terminal. He then proceeded to the bar where he met with Agent Simpson (T. 17-18).

After a brief conversation in the bar,* appellant suggested that they continue the discussion in the men's room. Upon arriving in the men's room, appellant told Agent Simpson that some of his friends had been arrested by undercover police officers wearing "Kel" (electronic voice

* Agent Simpson testified that he recognized the voice of appellant to be that of the "Richard" that he had previously spoken to on the telephone (T. 93), and further, that the man he met at the airport was dressed in a leather burgundy jacket and a dark blue hat (T. 100).

transmission devices) sets. Appellant then, according to the testimony of Agent Simpson, unbuttoned his coat, and stated: "I'm no police officer" and asked Agent Simpson if he could do the same. As Agent Simpson was about to comply with appellant's request, Special Agent Patrick Shea entered the men's room. Upon seeing Agent Shea, appellant and Agent Simpson left the men's room (T. 100-102). (Agent Simpson was not wearing any electrical apparatus).

After leaving the men's room, appellant and Agent Simpson engaged in a conversation wherein appellant told Simpson that he could get the one eighth kilogram of heroin in twenty minutes but that half of the previously agreed purchase price of $5000 would have to be advanced. When Agent Simpson balked at the suggestion of "fronting" the money, appellant told him that he had a girlfriend outside who could take the money, pick up the "package" and that he, appellant, would remain at the airport as security. Agent Simpson then showed appellant an envelope containing $5000 in $100 dollar bills, whereupon appellant and Agent Simpson left the terminal (T. 103-104).

Once outside the terminal, appellant waved to Miss Bryant, who was still inside his automobile, and beckoned her to drive to them. As the car approached, Agent Simpson directed appellant to go back into the terminal so that he could give Miss Bryant the $2500 with a minimum of risk. Agent Simpson entered the automobile, counted out $2500 and gave it to Miss Bryant. When Miss Bryant then requested to talk to appellant, Agent Simpson took back the $2500. Agent Simpson then relayed the message to appellant and, after appellant and his girlfriend engaged in a short conversation, appellant approached Agent Simpson and said: "Let me go back inside and copy down a telephone number, just in case anything happens while she's getting the heroin" (T. 106). Appellant and Agent Simp-

son then proceeded into the terminal, copied the number from a pay telephone and then gave the number and the money to Miss Bryant who then drove away from the terminal (T. 105-106).

After the departure of Miss Bryant, appellant and Agent Simpson entered the terminal in the vicinity of the telephone booth and awaited her return with the heroin. While they were waiting, they were approached by several police officers who openly frisked them in full view of the entire terminal.* As the frisk was in progress, the telephone, the number of which was previously given to Miss Bryant, commenced to ring but because of the situation could not be answered. Agent Simpson surreptitiously advised the police officers of his identity and the police officers departed—not, however, before appellant became suspicious. During the frisk, Agent Richard Slattery, who was known to appellant as a narcotic agent, exited from his observation point and was apparently seen by the appellant. Thus, appellant told Agent Simpson: "This looks like a setup to me. You could be a police officer. Well, I seen a narcotic agent around here named Dick,[**] and I just don't like this" (T. 106-112). Thereupon appellant made a telephone call to an unknown party and advised that person he was unhappy with the turn of events, that the party should return the heroin for the money and that he was leaving the airport. This conversation precipitated a heated debate between appellant and Agent Simpson (Agent Simpson had received neither the money nor the heroin). A compromise was eventually reached whereby Agent Simpson was to accompany appellant on a search for

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* Although not disclosed to the jury, the police officers mistakenly believed appellant and Agent Simpson to be the members of the Black Liberation Army who had recently murdered two policemen in New York City (App. A. 102 [second page]).

** Agent Richard Slattery is known as "Dick" Slattery (112).

Miss Bryant and the money. This search proved unsuccessful. Agent Simpson left appellant, proceeded to a diner where he phoned Agent Slattery and advised him of the events of the evening (T. 112-115).

After being advised by Agent Simpson that the sale had been aborted and that he had lost the $2500, Agent Slattery assembled his group of agents and proceeded to search for appellant and Miss Bryant (T. 30-31). At approximately 1:45 A.M. on the next morning, January 31, 1973, Agent Slattery was riding in an automobile with Agent Joseph Barrett when they observed a Cadillac that had just pulled to the side of the road. The agents pulled abreast of the Cadillac and Agent Slattery recognized appellant as the passenger. As the two men in the Cadillac alighted, Agent Slattery placed appellant under arrest and subsequently frisked, handcuffed and lead appellant to the rear seat of his government automobile. Once appellant was in the automobile, Agent Slattery, in the presence of Agent Barrett, removed a BND 13A form from his wallet and proceeded to read appellant his *Miranda* rights. Agent Slattery testified that it was his common practice to wait for an affirmative answer or sign of comprehension after reading each individual right to a defendant before proceeding to the following right and that he had so read the rights to appellant. In Agent Slattery's opinion, appellant understood his rights (T. 31-35).

After advising appellant of his rights, Agent Slattery inquired as to the whereabouts of Miss Bryant. Appellant replied that he did not know where she was but that he too was looking for her as she had his car and had promised him $500, after the deal had been completed. Appellant consented to assist in the search for Miss Bryant and even consented to allow the agents to look in his apartment for "Pookie" and the missing $2500 (T. 36). Thereafter, the agents proceeded to appellant's apartment where

they encountered a Nancy Brown. However, neither the money nor Miss Bryant were present. Again, with the consent of appellant, Agent Slattery directed two of his agents to remain in the apartment in the event Miss Bryant should return, while he, Agent Barrett and appellant proceeded on a trek through various after-hour social clubs known by appellant to be frequented by Miss Bryant (T. 36-39). This search also proved fruitless and at approximately 5:45 A.M. on January 31, 1973 all of the agents, together with appellant, returned to DEA Regional Headquarters on Church Street in New York City. At Church Street, appellant was photographed and fingerprinted and subsequently taken to Agent Slattery's group office area where he was questioned by Agents Mangino and Barrett (T. 39-40).

Prior to any questioning at the Church Street Office, Agent Mangino read Form BND 13 (waiver of rights) to the appellant and he acknowledged that he understood them. Appellant, in fact, stated to Agent Mangino "that he had heard them before and he knew what we were talking about" (T. 190-193). After having read the BND 13 Form to appellant, Agent Mangino inquired whether appellant would both sign the Form BND 13 and make a statement as to what had transpired on the previous evening. Appellant replied that, while he would not initial or sign any statement or form until he had consulted with legal counsel, he was willing to make a statement (T. 191-193).*

After appellant was given his Miranda warnings, Agents Mangino and Barrett proceeded to question him concerning the aborted sale and reduced his answers to writing (T.

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* Form BND 13 was witnessed by both Agents Mangino and Barrett with the notation that the appellant refused to sign it (T. 193).

180-188, 194-196).* Appellant's statement, which is set forth in its entirety in the appendix (A. 102), reaffirms the testimony of Agent Simpson as it relates to appellant's receipt of the phone call on January 30, 1973, proceeding to the airport with Miss Bryant, negotiating with Agent Simpson, transferring of the money to Miss Bryant, the frisking by the police and the aborting of the sale. Appellant, throughout both his post arrest statement in Agent Slattery's automobile and the formal, written statement, tended to diminish his involvement in the sale to that of a middleman and infer that the primary drug dealer was Miss Bryant. In both statements he contended that his monetary interest was limited to a $500 gift "if the deal went down" (T. 36; A. 102).

The statement, having been taken from the appellant and reduced to writing, was read back to the appellant by Agent Mangino and appellant stated that he agreed with what the agents had written but still refused to sign or initial anything until he talked to legal counsel (T. 187, 198-199). He did not, however, ask for permission to call his counsel, nor request that counsel be provided, nor that questioning cease.

(2)

On April 5, 1973, appellant, together with Miss Bryant, were indicted for conspiracy to possess and distribute approximately one eighth of a kilogram of heroin and the conversion of $2500 of United States funds. Trial commenced on February 22, 1974, before the Honorable Jack B. Weinstein. Prior to the commencement of the trial, the Government moved to dismiss the conversion count of the indictment and proceed solely on the conspiracy count. The motion was granted. After both the Government and defendant

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* Agent Mangino asked the questions of the defendant while Agent Barrett wrote down the answers in a statement or narrative form (T. 183) with an attempt to utilize the words of the appellant himself (T. 186, 198).

rested, but before summation, defendant Juanita Bryant entered a plea of guilty to a superseding information charging her with violation of Title 21, United States Code, § 844, (possession of a controlled substance, heroin hydrochloride, on January 30, 1973) a misdemeanor. The jury, after deliberation, failed to reach a verdict on appellant and reported itself deadlocked. Accordingly, a mistrial was declared.

(3)

On April 2, 1974, the grand jury, after listening to the testimony of Agent Simpson, returned a superseding indictment charging appellant with the intent to distribute approximately one eighth of a kilogram of heroin hydrochloride. Agent Simpson testified before the grand jury that on January 30, 1973 he made a phone call to appellant to advise him that he was in town, that he was prepared to purchase one eighth of a kilogram of heroin for $5000, and that he wished to meet appellant at LaGuardia Airport. Agent Simpson further testified that he met appellant at the airport, gave $2500 to appellant's girlfriend and waited futilely at the airport with appellant while his girlfriend went to pick up the heroin which never materialized (A. 100-101). In response to a question from a grand juror concerning appellant's girlfriend, the Assistant United States Attorney, Myles C. Cunningham, inquired of Simpson, as to the disposition of Miss Bryant's case, Simpson testified that Miss Bryant pled guilty to a misdemeanor charging possession of heroin on the evening in question (T. 87).

(4)

Prior to the commencement of appellant's first trial he was given a copy of his statement, and the Court, and all parties, listened to the recording of Agent Simpson's telephone conversation with appellant. A transcript of that recording was also provided to appellant and the Court. No objections were voiced during either trial as to the

audibility or quality of the recording and the transcript thereof.

Prior to the commencement of appellant's second trial a hearing was held as to the voluntariness of appellant's statements. At the termination of the hearing the District Court found:

> I find the defendant was fully apprised of his rights and he understood those rights. He was not in any way coerced, he was not intoxicated, and there is no reason to suppress. Accordingly, the motion is denied. (Supp. T. 52).*

ARGUMENT

POINT I

The trial court properly denied appellant's motion to inspect the grand jury minutes and to dismiss the indictment.

Appellant asserts that the faliure of the trial court to grant his motion and conduct a pretrial inspection of the grand jury minutes constitutes reversible error. It was initially contended by appellant that the grand jury testimony was insufficient to uphold an indictment for attempted sale of heroin because there was no testimony regarding possession of heroin by the defendant (Supp. T. 3).

The trial court, in the exercise of its discretion, correctly denied the motion to inspect and, in effect, held that possession of heroin is not an element of the offense of attempt. This Court has frequently stated that a decision to grant

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* Reference to the transcript of the suppression hearing of May 7, 1974, will be designated "Supp. T. ....".

or deny a motion to inspect grand jury minutes is in the province of the trial court and will not be upset unless there was an abuse of discretion. See *United States* v. *Tane,* 329 F.2d 848, 853 (2d Cir. 1964).*

Moreover, Judge Weinstein's decision is supported by *Costello* v. *United States,* 350 U.S. 359 (1956) which foreclosed all pretrial challenges to the adequacy or competency of the evidence presented to the grand jury. The Court in *Costello* reasoned that permitting such challenges would result in abuses and great delays as every defendant would request a preliminary trial to determine the adequacy and competency of the testimony against him. *Costello, supra* at 363. In prohibiting such motions the Court stated (*id.*, at 363):

> An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

This is not to say that appellant is precluded from making any pretrial challenge of the grand jury proceedings, see, *United States* v. *Fein,* — F.2d — (2d Cir. Slip opinions, 5759, decided October 15, 1974); *United States* v. *Dioguardia,* 332 F. Supp 7 (S.D.N.Y. 1971); but any challenge must be accompanied by some evidence of "prejudicial irregularity influencing the grand jury, or some similar compelling reason" *United States* v. *Cummings,* 49 F.R.D. 160, 161 (S.D.N.Y. 1969); see also *Lawn* v. *United States,* 355 U.S. 339 (1958); *Holt* v. *United States,* 218 U.S. 245 (1910). Appellant's allegation of insufficiency certainly did not fall within these guidelines. See also, *United States* v. *Dionisio,* 410 U.S. 1, 16 (1973).

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* Judge Weinstein, was familiar with all facts, including the anticipated testimony of government witnesses, as he had previously presided over the first trial of appellant, less than three months prior to the commencement of the trial herein.

During the course of the trial, appellant renewed his motion to dismiss the indictment on the basis of the grand jury testimony but shifted his allegation from one of insufficiency to one of prejudice. In this second motion appellant contended that the questions asked Agent Simpson concerning Juanita Bryant led the jury to believe that Miss Bryant implicated appellant and thus appellant was prejudiced. Judge Weinstein again, in the exercise of his discretion, denied this motion.* Considering the fact that Miss Bryant did plead guilty to a superseding information charging her with possession of heroin on the night that appellant was charged with the attempted sale, the government fails to see any prejudice. There is no requirement that all testimony presented to a grand jury be admissable in the trial of the action, *United States* v. *Calandra,* 414 U.S. 338, 344-345 (1974); *United States* v. *Andrews,* 381 F.2d 377 (2d Cir. 1967) and, as this Court said in *United States* v. *Schwartz,* 464 F.2d 499, 5511 (2d Cir.), *cert. denied,* 409 U.S. 1009 (1972):

> "[A]s long as there is some competent evidence to sustain the charge issued by the grand jury, an indictment should not be dismissed. [Citations omitted]."

Plainly, the testimony presented to the grand jury in the case at bar was more than sufficient to sustain an indictment charging an attempt to distribute heroin and the denial of the motion by the trial court should be sustained.

Appellant now, in presenting these previous "intermediate orders" to this Court for review, couples them with various other allegations *de novo* of prejudicial, inadequate, inaccurate, and incompetent testimony before the grand jury. The Government is not unmindful of this Court's concern for the casual presentation of evidence to a grand

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* The Government advised the Court that the Grand Jury testimony concerning Miss Bryant was elicited after inquiry from a juror (T. 87).

jury, *see, United States* v. *Estepa*, 471 F.2d 1132, 1135 (2d Cir. 1972), but it respectfully submits that none of appellant's allegations, even if capable of substantiation, would constitute reversible error.

The grand jury heard direct testimony from Special Agent William Simpson. He testified that he made a telephone call to appellant on January 30, 1973 to let appellant know that he was in town and was ready to purchase one-eighth kilogram of heroin for $5,000. Agent Simpson related that arrangements were made to meet appellant at the Alleghany Airlines Terminal at La Guardia Airport, that he met with appellant at the terminal, that he had $5,000 in his possession and that he gave $2,500 of this money to appellant's girlfriend, Juanita Bryant. He explained that Miss Bryant was to take this money and go and pick up the heroin while he and appellant awaited her return at the terminal. It was also most candidly brought to the attention of the grand jury that Miss Bryant never returned with the heroin. In response to a juror's question, concerning Miss Bryant, the prosecutor elicited the testimony from the witness that Miss Bryant had pled guilty to a misdemeanor charging possession of heroin on January 30, 1973, the night of the attempted sale.* .

It is respectfully submitted that a reading of the grand jury testimony, as this Court did in *United States* v. *Ramirez*, 482 F.2d 807 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973), will adequately show that the indictment was based on an eyewitness account of an attempted sale of a one-eighth kilogram of heroin and that the indictment was properly obtained.

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* Juanita Bryant was previously convicted on December 15, 1972 in Fedreal Court, Boston, Mass. for violation of 18 U.S.C. § 846 (conspiracy) and sentenced to seven years imprisonment on an unrelated narcotics case. This was not brought to the attention of the grand jury.

POINT II

Appellant was properly apprised of his constitutional rights prior to giving a statement and the statement was properly admitted into evidence.

Appellant, immediately after his arrest, was advised of his rights and made statements to the arresting agents admitting his presence at the airport with Agent Simpson and Miss Bryant and that he anticipated the receipt of $500 from Miss Bryant in the event that the sale of heroin was completed. Several hours later he was taken to DEA headquarters, processed, again advised of his constitutional rights and asked if he wished to make a statement. Appellant, apparently realizing that he had already made one oral statement, consented to the giving of a second. This second statement was recorded by Agent Barrett of the Drug Enforcement Administration in longhand on the basis of questions put to appellant and his responses thereto. Appellant refused to sign or initial either the BND-13 form (waiver of rights), although he indicated that he understood them, or the recorded statement, after having it read back to him, although he stated that it was correct. At no time has appellant ever repudiated either statement or claimed that he gave the statements unvoluntarily.

Prior to the trial of the indictment the court held a full suppression hearing into the voluntariness of appellant's statement and the procedure by which appellant was advised of his constitutional rights.* The Court found the defendant had been fully apprised of his rights, that he understood them, and accordingly denied the motion to

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* Although appellant was free to testify at the hearing as to the voluntariness of his statements or the conduct of the interrogating agents he chose to remain silent even though his testimony would not be admissable against him as part of the Government's case in chief. Appellant did not testify in his own defense in either trial.

suppress. Appellant now argues that his refusal to sign either the waiver of rights form or the transcribed statement vitiates the voluntariness of the statement. While this may be a novel argument, it has little merit as the first warning given to the appellant advised him that he had the right to remain silent and the second advised him that anything that he said could and would be used against him in a court. The absence of any contention by the appellant that he requested an attorney and the questioning persisted without his attorney's assistance, or that his request for an attorney went unheeded, negates any claim to relief under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).* *United States* v. *Ellis*, 457 F.2d 1204, 1205-1206 (8th Cir. 1972); *United States* v. *Kress*, 446 F.2d 358, 360 (9th Cir.), *cert. denied*, 404 U.S. 947 (1971); compare *United States* v. *Ramos*, 448 F.2d 398, 399 (5th Cir. 1971).

Appellant further argues that inasmuch as he never waived "his right either to counsel or against self-incrimination" the statement should not have been admitted (App. Br. 42), and that "the only purpose for which the Government could use the statement was to refresh the recollection of the witnesses" (App. Br. 41). The Government readily concedes that if the taking of the statement violated appellant's rights it should not have been admitted but, barring this finding of violation of rights, the statement was properly admitted. Agent Mangino testified at trial that he was the agent who questioned appellant at the DEA headquarters while Agent Barrett recorded appellant's answers in a statement form. When showed this statement, Agent Mangino identified it as the statement taken from appellant on the morning of January 31, 1973, related that he had seen the document the preceding day in the prosecutor's

* The Court specifically found that there was an intelligent waiver of his rights (Supp. T. 52).

office, but, when questioned about what the appellant said, from his own recollection, stated:

> I think if I told you what he said it would be because I read the statement yesterday, not because I remember what he said that night (T. 195).

Prior to the introduction of this statement into evidence, Agent Mangino testified that he had read the document at the time it was recorded, that it was an accurate reflection of what the appellant told him, that the document was read to the appellant and that, while appellant refused to sign it, appellant acknowledged to him that the statement accurately reflected the events that occurred. The court, upon hearing this testimony, and having previously found the statement to be voluntary, admitted the document into evidence * and, upon consent of appellant, directed copies of the statement to be distributed to the members of the jury (App. Br. 16).

This statement was properly admitted into evidence under the doctrine of past recollection recorded *United States* v. *Kelly,* 349 F.2d 720, 770 (2d Cir. 1965), *cert. denied* 384 U.S. 947 (1966) as well as an admission by a party.

Finally, appellant ends his argument under Point II of his brief with the allegation that the "illegal use of wire tap information" tainted the arrest and thus constituted

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* Immediately before admission into evidence of the appellant's statement, the Court instructed the jury as follows:

> The Court: "Do you understand, ladies and gentlemen, this is not a statement signed by the defendant. If you do not believe that he did say it was accurate, then ignore it completely. Even if you do believe he said it was accurate, you can consider whether he was under duress or did this knowingly or whether he was led into it and the like, and determine how much weight should be given to it. Is that clear?
>
> All right, mark it in evidence, please (T. 200).

error. He also urges that there was no probable cause for his arrest and, therefore, the statements he made were the "fruit" of an unlawful arrest. The Government knows of no wiretap or electronic surveillance used in the investigation of this appellant other than the recording of the phone conversation between Agent Slattery and appellant. Appellant's claim with respect to lack of probable cause for his arrest is, likewise, patently frivolous.

POINT III

The tape recording of appellant's telephone conversation with Agent Simpson was properly admitted into evidence.

The Court, after hearing testimony from Agent Simpson concerning a phone conversation between he and one "Richard", admitted into evidence the tape recording of the phone conversation.

Appellant first raises the argument that this was improper as "the conversation was recorded by Simpson, without either the knowledge or consent of the Appellant and there was no third-party listening in on the conversation." (App. Br. 45). Assuming that this argument is intended to allege a violation of appellant's Fourth Amendment right to privacy it must fail as such an argument was put to rest in *United States* v. *Kaufer*, 406 F.2d 550, 551-552 (2d Cir. 1969), *aff'd*, 394 U.S. 458 (1969). In *Kaufer*, the Court held that only the consent of one party to a conversation is required to validate the electronic surveillance and recording of the conversation. See also *United States* v. *White*, 401 U.S. 745 (1971).

Equally without merit is appellant's second allegation of error that the government failed to identify the appellant as the party conversing with Agent Simpson. The

Court, prior to admitting the tape into evidence, inquired of Agent Simpson:

> The Court: Indicating the defendant. Is that the man whose voice you recognized over the phone.
> The Witness: Yes.
> The Court: Objection overruled. Mark them in evidence (T. 94).

In addition to Agent Simpson's voice identification of appellant it must be recalled that appellant described the clothes that he would be wearing, immediately entered into conversation with Agent Simpson upon first meeting him in the bar and, lastly, admitted in his statement that he, in fact, received the call from Simpson.

POINT IV

The trial court properly denied appellant's motion for a directed verdict.

The gravamen of appellant's argument appears to be that the Government's case against the appellant was not sufficient to support a conviction. In support of this argument appellant asserts that apart from the taped telephone conversation between Agent Simpson and appellant and the statement given by the appellant to agents of the DEA, wherein he admitted a role in the attempted sale of heroin, the record is barren of any evidence that would support a criminal offense. Appellant further alleges that there has been no corroboration of either the tape recording or the confession except by testimony of the arresting agents.

The government respectfully submits that the mere statement of appellant's claim of insufficiency is enough to show that his contention is without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

December 11, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
MYLES C. CUNNINGHAM,
Assistant United States Attorneys,
*of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of David N. Hofstein in the preparation of this brief. Mr. Hofstein is a second year student at New York Universtiy Law School.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

PAUL B. BERGMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of December 1974 he served ~~a copy~~ two copies of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Leroy B. Kellam, Esq.
200-17 Linden Boulevard
St. Albans, New York 11412

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

PAUL B. BERGMAN

Sworn to before me this
13th day of December 1974

Olga P. Morgan
OLGA P. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975